Pragalathan a/l Balakrishnan v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-05(M)-434–11 OF 2016
ZAWAWI SALLEH, KAMARDIN HASHIM AND HARMINDAR SINGH JJCA
20 JULY 2017

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Criminal Procedure — Appeal — Appeal against conviction and sentence — Trafficking in dangerous drugs — Accused convicted and sentenced to death — Police carried out surveillance and ambush after receiving information that accused would sell drugs on motorcycle — Whether motorcycle formed integral part of prosecution's case — Whether non-production of motorcycle and its owner detrimental to prosecution's case — Whether prosecution proved charge beyond reasonable doubt — Whether conviction and sentence safe — Dangerous Drugs Act 1952

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Upon receiving information that a certain drug-trafficking activity would take place, a police team led by SP5 proceeded to the said place and carried out surveillance. The appellant was seen riding a motorcycle and stopping by the roadside. When SP5 and his team ambushed the appellant, he was holding a plastic bag. The plastic bag was discovered to contain solid materials which were later confirmed by the chemist to be 1,009g of cannabis. The appellant was subsequently charged at the High Court for trafficking in dangerous drugs, an offence under s 39B of the Dangerous Drugs Act 1952 ('the DDA'). At the end of the prosecution's case, the High Court judge ('the HCJ') found that the appellant had custody and control of the drugs as he was seen holding the bag in which the drugs were found. The appellant was deemed to have possession and knowledge of the drugs under the statutory presumption of s 37(d) of the DDA. Taking into consideration the weight of the drugs, the HCJ further invoked the presumption of trafficking under s 37(da) of the DDA. The appellant was then called to enter his defence. In his defence, the appellant submitted, inter alia, that he was never arrested while he was on the motorcycle; and he had never seen nor had any knowledge of the plastic bag containing the drugs. The HCJ found the appellant's defence to be a mere denial and that he had failed to rebut the statutory presumptions as well as failed to cast a reasonable doubt on the prosecution's case. The appellant was accordingly found guilty, convicted for the offence and sentenced to death. Hence, the present appeal. The appellant submitted that his defence was not sufficiently considered by the HCJ especially when the existence of the motorcycle in question was never proved either by its production in court or through documentary evidence.

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Held, allowing the appeal:

(1) The motorcycle was an integral part to the prosecution's case. SP5 had received information that a man would arrive on a motorcycle to sell cannabis in the area, as stated in the charge. Leaving aside the admissibility of such information, the primary focus of the police would have been on the said motorcycle. It was only when the motorcycle arrived that the police team sprung into action. When the appellant was arrested, he was said to have been seated on the said motorcycle with the engine still running. Clearly, there was a connection between the appellant and the said motorcycle, going by the case put forward by the prosecution (see paras 15–16).

(2) Apart from not being produced: (a) the motorcycle did not appear in the senarai bongkar; (b) there was no record of the motorcycle being released to the owner on a bond; (c) there was not a single photograph of this motorcycle adduced at the trial; and (d) there was no Road Transport Department search to, at least, show the particulars of this motorcycle and especially as to its existence and ownership. The sum effect of these circumstances led to a serious doubt as to the version introduced by the prosecution as to how the appellant came to be in possession of the drugs. It lent credence to the defence version that the appellant had nothing to do with the drugs which formed the subject matter of the charge (see paras 21–22).

(3) The owner of the motorcycle was a material witness as he would be able to confirm: (a) the identity of the motorcycle and the fact that he was the owner; (b) his relationship with the appellant; (c) if he had indeed obtained custody of the motorcycle; (d) if he knew the motorcycle was at the police station; and (e) if he had allowed the appellant to take the motorcycle or if it was stolen. However, the owner was not produced by the prosecution (see para 16).

(4) The prosecution left many material question unanswered and failed to prove the charge against the appellant beyond reasonable doubt. The HCJ failed to adequately address material aspect of the defence case which amounted to a serious misdirection by way of non-direction. The appellant's conviction was wholly unsafe. The conviction and sentence passed by the High Court was set aside. The appellant was acquitted and discharged (see para 24).

[Bahasa Malaysia summary

Susulan maklumat yang diterima bahawa satu aktiviti pengedaran dadah akan dijalankan, sepasukan polis yang diketuai SP5 terus ke tempat yang dikatakan dan melakukan pengawasan. Perayu dilihat menunggang motosikal dan berhenti di tepi jalan. Apabila SP5 dan pasukannya menyerang hendap perayu, dia sedang memegang sebuah beg plastik. Beg plastik ini didapati

mengandungi ketulan mampat yang kemudian disahkan oleh ahli kimia sebagai 1,009g ganja. Perayu kemudiannya dipertuduh di Mahkamah Tinggi kerana mengedar dadah, satu kesalahan di bawah s 39B Akta Dadah Berbahaya 1952 ('ADB'). Pada penghujung kes pendakwaan, hakim Mahkamah Tinggi ('HMT') mendapati perayu mempunyai jagaan dan kawalan atas dadah kerana dia dilihat memegang beg tempat dadah tersebut dijumpai. Perayu dikatakan mempunyai milikan dan pengetahuan tentang dadah tersebut bawah anggapan statutori s 37(d) ADB. Mengambil kira berat dadah, HMT selanjutnya membangkitkan anggapan pengedaran di bawah s 37(da) ADB. Perayu dipanggil membela diri. Dalam pembelaannya, perayu menghujahkan, antara lain, dia tidak ditahan semasa dia di atas motosikal; dan dia tidak pernah melihat atau mempunyai pengetahuan tentang beg plastik berisi dadah itu. Hakim Mahkamah Tinggi memutuskan bahawa pembelaan perayu satu penafian semata-mata dan dia gagal menyangkal anggapan statutori serta gagal membangkitkan keraguan munasabah atas kes pendakwaan. Oleh itu, perayu didapati bersalah, disabitkan atas pertuduhan dan dijatuhkan hukuman mati. Oleh itu rayuan ini. Perayu menegaskan bahawa pembelaannya tidak dipertimbangkan secukupnya oleh HMT khususnya apabila kewujudan motosikal yang dipertikaikan tidak dibuktikan baik dari segi pengemukaan di mahkamah mahupun keterangan dokumentar.

Diputuskan, membenarkan rayuan:

(1) Motosikal tersebut adalah pelengkap kes pendakwaan. SP5 menerima maklumat bahawa seorang lelaki akan tiba bermotosikal untuk menjual ganja di kawasan tersebut, seperti yang dinyatakan dalam pertuduhan. Menolak tepi kebolehterimaan maklumat ini, fokus utama pihak polis pastinya terhadap motosikal tersebut. Hanya apabila motosikal tersebut tiba barulah pihak polis mula bertindak. Apabila perayu ditahan, dia dikatakan sedang duduk di atas motosikal ini dengan enjin yang masih hidup. Jelas wujud hubungan antara perayu dan motosikal tersebut, melihat pada kes yang dikemukakan oleh pendakwaan (lihat perenggan 15–16).

(2) Selain tidak dikemukakan: (a) motosikal tersebut tidak dinyatakan dalam senarai bongkar; (b) tiada rekod bahawa motosikal ini diserahkan kepada pemiliknya melalui bon jaminan; (c) tidak terdapat satu pun gambar motosikal yang dikemukakan semasa perbicaraan; dan (d) tiada carian Jabatan Pengangkutan Jalan Raya untuk, sekurang-kurangnya, menunjukkan ciri-ciri motosikal dan, khasnya, kewujudan dan milikannya. Kesan kumulatif hal keadaan ini membawa pada keraguan serius versi pendakwaan tentang bagaimana perayu mempunyai milikan dadah tersebut. Ini menyokong versi pembelaan bahawa perayu tiada kaitan dengan dadah yang membentuk hal perkara pertuduhan (lihat perenggan 21–22).

(3) Pemilik motosikal tersebut adalah saksi material kerana dia boleh mengesahkan: (a) identiti motosikal dan fakta bahawa dia pemiliknya; (b) hubungannya dengan perayu; (c) jika dia sememangnya mempunyai milikan motosikal; (d) jika dia tahu motosikal tersebut berada di balai polis; dan (e) jika dia membenarkan perayu mengambil motosikal tersebut atau jika motosikal tersebut dicuri. Walau bagaimanapun, pemiliknya tidak dipanggil oleh pendakwaan (lihat perenggan 16).

(4) Pihak pendakwaan meninggalkan banyak soalan material tidak berjawab dan gagal membuktikan pertuduhan terhadap perayu tanpa keraguan munasabah. Hakim Mahkamah Tinggi gagal mempertimbangkan secukupnya aspek material kes pembelaan dan ini terangkum dalam salah arahan serius iaitu ketidakarahan. Sabitan perayu langsung tidak selamat. Sabitan dan hukuman yang dijatuhkan oleh Mahkamah Tinggi diketepikan. Perayu dilepaskan dan dibebaskan (lihat perenggan 24).]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 321–500.

Cases referred to

DA Duncan v PP [1980] 2 MLJ 195, FC (refd)
Kobra Taba Seidali v PP [2014] 2 MLJ 554; [2014] 2 CLJ 12, CA (refd)
PP v Asnawi bin Yusuf [2011] 4 MLJ 16, CA (refd)
PP v Ling Tee Huah [1982] 2 MLJ 324 (refd)

Legislation referred to

Criminal Procedure Code ss 112, 413
Dangerous Drugs Act 1952 ss 37(d), 39B(1)(a)

Appeal from: Criminal Trial No 45A-66–08 of 2015 (High Court, Kuala Lumpur)

V Samynathan (V Samynathan & Co) for the appellant.
Wong Poi Yoke (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Harmindar Singh JCA (delivering judgment of the court):

[1] The appellant was charged in the High Court at Kuala Lumpur for an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). The charge, which was subsequently amended, read as follows:

> Bahawa kamu pada 27/4/2015 jam lebih kurang 10.30 malam, di kawasan TESCO Batu 4, Jalan Klang Lama, dalam daerah Brickfields, Wilayah Persekutuan Kuala Lumpur, telah didapati mengedar dadah berbahaya berat bersih 1009 gram

Cannabis. Oleh itu, kamu telah melakukan kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

[2] After a trial, the appellant was found guilty of the offence as stated in the charge. He was accordingly convicted and sentenced to death by the High Court on 14 November 2016. The appellant then filed this appeal. The appeal was heard on 31 May 2017. At the conclusion of the submissions, we unanimously allowed the appeal. We set aside the conviction and sentence passed by the High Court and substituted in its place an order for acquittal and discharge. Our reasons for doing so now follow. This will form the judgment of the court.

THE CASE FOR THE PROSECUTION

[3] The prosecution called five witnesses. The facts leading to the arrest of the appellant were set out in the judgment of the learned judicial commissioner ('judge') as follows (at pp 11–13, appeal record, Vol 1):

Pada 27.4.2015 jam lebih kurang 7.00 malam, Asisten Superintenden Polis, Mohd Nazri bin Ismail (SP5) telah menerima panggilan telefon dari seorang lelaki yang merahsiakan identitinya, di mana lelaki tersebut memberi maklumat bahawa seorang lelaki India yang menaiki sebuah motorsikal bernombor pendaftaran BMF 5327 akan menjual ganja di kawasan pasaraya TESCO, Batu 4, Jalan Klang Lama, Kuala Lumpur.

Berdasarkan maklumat ini, SP5 telah mengumpul 12 orang anggota polis dan memberi taklimat berhubung maklumat yang diterima dan tindakan yang selanjutnya.

Seterusnya pada jam lebih kurang 8.00 malam, SP5 dan anggota pasukannya telah bertolak ke lokasi di kawasan berhampiran pasaraya TESCO tersebut berdasarkan maklumat yang diterima dan tiba di lokasi pada jam lebih kurang 10.00 malam.

Di tempat tersebut, SP5 telah mengarahkan anggota pasukannya membuat pemantauan di sekitar kawasan pasaraya TESCO berkenaan.

Selanjutnya, setelah hampir 30 minit pemantauan dibuat di tempat tersebut, SP5 melihat sebuah motorsikal bernombor pendaftaran BMF 5327 seperti maklumat yang diberikan, yang ditunggang oleh seorang lelaki India yang kemudian dicamkan sebagai OKT, berhenti di tepi jalan Batu 4, Jalan Klang lama berhampiran pasaraya TESCO berkenaan.

SP5 dan anggota serbuan seterusnya telah menyerbu ke arah OKT yang ketika itu masih berada di atas motorsikal berkenaan sambil memegang satu plastik biru di tangan kanannya.

SP5 juga telah memaklumkan SP5 adalah pegawai polis kepada OKT dan ketika itu OKT terkejut dan cuba melarikan diri. Semasa tangkapan hendak dibuat terhadap OKT, berlaku tarik-menarik terhadap plastik biru yang dipegang oleh OKT antara

OKT dan SP5. Akhirnya, SP5 berjaya merampas plastik biru tersebut dari tangan OKT dan tangkapan dibuat terhadap OKT.

SP5 seterusnya telah membuat pemeriksaan terhadap beg plastik biru tersebut di hadapan OKT dan mendapati di dalamnya mengandungi 1 ketulan mampat yang dibalut dengan plastik lutsinar disyaki ganja.

OKT dan barang kes kemudiannya dibawa ke Ibu Pejabat Polis Daerah Brickfield untuk tindakan lanjut.

Pada 30.4.2015, bahan ketulan mampat ini telah dihantar ke Jabatan Kimia Malaysia di Petaling Jaya dan setelah dianalisa oleh ahli kimia, SP4, disahkan ianya adalah dadah berbahaya iaitu Cannabis seperti yang ditakrifkan di bawah seksyen 2 ADB 1952 dan seberat 1009 gram.

[4] At the end of the prosecution case, although several issues were raised by counsel for the appellant at the trial, the learned trial judge found that a prima facie case had been established by the prosecution. The learned judge found that the appellant had custody and control of the illicit drugs as he was seen to be holding the blue plastic bag in which the illicit drugs were found. The appellant was therefore deemed to have possession and knowledge of the drugs by the application of the statutory presumption under s 37(d) of the Act. For the element of trafficking, the learned judge invoked the presumption of trafficking under s 37(da) of the Act after taking into account the weight of the drugs seized. The appellant was then ordered to enter his defence on the charge.

THE DEFENCE CASE

[5] The appellant chose to give evidence on oath. His evidence was summarised by the learned trial judge as follows (at pp 25–26, appeal record, Vol 1):

Pada 27.4.2015, lebih kurang jam 10.00 malam, OKT berada diperhentian bas di Batu 4, Jalan Klang Lama kerana ada temu janji dengan kawan perempuannya bernama Jothi Letchumy yang bekerja di sebuah klinik swasta di kawasan tersebut.

Di perhentian bas berkenaan, OKT menunggu Jothi Letchumy habis bertugas sambil melayari telefon bimbitnya. Pada ketika itu, OKT mendapati sekumpulan orang telah mengelilingi OKT dan memperkenalkan diri sebagai polis dan salah seorang dari anggota polis tersebut telah menggari tangan OKT. Pihak polis tersebut kemudiannya telah mengambil barang peribadi OKT termasuk telefon bimbit, dompet dan wang tunai RM800.00.

OKT menafikan ada menaiki motorsikal BMF 5327 di tempat kejadian. OKT juga menafikan ada duduk di atas mana-mana motorsikal di tempat berkenaan. OKT juga menyatakan bahawa sebuah beg plastik biru telah ditunjukkan kepada OKT oleh SP5 di Balai Polis Brickfield dan tidak pernah melihat beg plastik tersebut sebelum itu.

OKT juga tidak tahu siapa pemilik motorsikal BMF 5327 dan tidak mengenali Kalairasan a/l Munusamy yang dikatakan pemilik motorsikal berkenaan.

OKT juga menafikan OKT ditangkap semasa berada di atas motorsikal dan memegang beg plastik biru tersebut. A

Selain itu, OKT juga menjelaskan OKT tidak mempunyai lesen memandu kereta atau motorsikal.

B

[6] At the conclusion of the trial, the learned judge appreciated that the appellant's testimony with regard to the drugs in question was at variance with the version given by the prosecution witnesses. The learned judge however did not accept the version of the appellant that he was never arrested whilst he was on the said motorcycle and that he had never seen nor had knowledge of the blue plastic bag containing the impugned drugs. C

[7] The learned judge found no reason to doubt the evidence of the police witnesses SP2 and SP5 who were there when the appellant was arrested. Relying on the cases of *Public Prosecutor v Ling Tee Huah* [1982] 2 MLJ 324 and *DA Duncan v Public Prosecutor* [1980] 2 MLJ 195, the learned judge came to the finding that the defence of the appellant was a mere denial. The learned judge found that the appellant had failed to rebut the statutory presumptions as well as failed to raise a reasonable doubt in the case for the prosecution. The appellant was accordingly found guilty, convicted and sentenced to death. D E

THE INSTANT APPEAL

[8] Before us, although several grounds were listed in the petition of appeal, learned counsel for the appellant attacked the findings of the learned trial judge on one pivotal issue involving the question of possession and knowledge of the impugned drugs. F

[9] The criticism that was fashioned before us was that the defence of the appellant, in that he was not riding the said motorcycle on that fateful day; that he was not sitting on the said motorcycle at the time of his arrest; that he was not holding the impugned blue plastic bag in his right hand; that he had no connection with the said motorcycle; and that he did not know the owner of the said motorcycle, was not sufficiently considered by the learned judge especially when the existence of the motorcycle in question was never proved either by its production in court or through documentary evidence. Although allegedly the owner of the motorcycle was listed as one of the witnesses, he was never called to give evidence. G H

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[10] Now, to be fair, the learned judge had considered the absence of the motorcycle and its owner and arrived at the following finding as stated in paras 42–43 of the grounds of judgment:

A [42] Dalam konteks kes ini, seperti yang telah saya putuskan di akhir kes pendakwaan bahawa pemilik motorsikal BMF 5327 tersebut bukan merupakan saksi material bagi kes pendakwaan dan setelah meneliti pembelaan OKT, saya juga dapati ketiadaan pemilik motorsikal ini tidak menjejaskan naratif kes pembelaan *(sic)*. Ini kerana pembelaan OKT antara lain adalah OKT tiada kaitan dengan B motorsikal BMF 5327 dan tidak mengenali pemiliknya. Keterangan yang ada juga tidak menunjukkan dadah ditemui pada mana-mana bahagian motorsikal berkenaan tetapi menurut pihak pendakwaan adalah dirampas dari tangan kanan OKT dan ini telah pun dinafikan oleh OKT dalam pembelaannya.

[43] Sehubungan itu, tiada ketidakadilan yang berlaku tanpa kehadiran pemilik C motorsikal berkenaan.

[11] The crucial issue which lies at the heart of this appeal is whether the appellant had rebutted the presumption of knowledge and possession of the drugs which formed the subject matter of the charge. On this score, the D appellant had put forward his version of the events relating to the motorcycle during the cross-examination of prosecution witness SP5 as follows (at pp 34–35, appeal record, Vol 2):

Q: Saya cadangkan sebenarnya OKT pada malam itu tidak menaiki motorsikal E seperti yang dikatakan oleh tuan, setuju atau tidak?

A: Tidak setuju.

Q: Motorsikal berkenaan tidak ada sangkut dengan beliau, setuju atau tidak?

A: Tidak setuju.

F Q: Saya cadangkan ASP tidak masuk motorsikal, anak kunci dan sebagainya dalam P16 sebab motorsikal itu tidak ada kena mengena dengan OKT, setuju atau tidak? OKT juga tidak tandatangan dalam borang senarai sebab tidak ada motorsikal?

A: Tidak setuju.

G **[12]** By this line of questioning, it is plain that the appellant was disputing the version of the prosecution with regard to the appellant being arrested on the motorcycle. In other words, the prosecution was put on notice that their version of events was being challenged.

H **[13]** Now, this stance of the defence could easily have been rebutted by the production of the motorcycle itself or by the evidence of the motorcycle owner who was listed as a witness and, as is normally the case, a police statement would have been taken from him under s 112 of the Criminal Procedure Code ('the CPC'). Having had such notice, the failure to produce the motorcycle or I call the owner to give evidence is a complete mystery.

[14] To venture a guess, it could be that the prosecution felt that the production of the motorcycle was not important and the motorcycle owner was not a material witness. This much appears from the submissions of the learned

DPP to the trial court. It also appears from the judgment of the learned trial judge in that he accepted this contention.

[15] In this respect, we are of the view that the motorcycle was integral to the prosecution case. SP5 had received information that an Indian man would arrive in motorcycle BMF 5327 to sell ganja in the area as stated in the charge. Leaving aside the admissibility of such information, the primary focus of the police would have been on the said motorcycle. It was only when the said motorcycle arrived that the police team sprung into action. When the appellant was arrested, he was said to have been seated on the said motorcycle with the engine still running.

[16] So clearly, there was a connection between the appellant and the said motorcycle going by the case put forward by the prosecution. The owner of the said motorcycle becomes a material witness as he will be able to confirm the identity of the motorcycle and the fact that he is the owner. He will also be able to inform the court as to his relationship with the appellant. He would have been able to confirm if he had indeed obtained custody of the motorcycle that had been detained by the police. He could also confirm how he knew the said motorcycle came to be at the police station. More importantly, he would be able to say if he had allowed the appellant to take the said motorcycle or that perhaps it was stolen.

[17] Now, to complete the narrative, this motorcycle owner, whose name was given at the trial as Kalairasan a/l Munusamy ('Kalairasan'), was offered and accepted by the defence to be a witness for the defence at the end of the prosecution case in the event the appellant was called to enter his defence. As it turned out, and after the appellant had given evidence, this Kalairasan was not produced by the prosecution. This was obviously an unsatisfactory state of affairs as the learned DPP in her cross-examination of the appellant had adopted the following line of questions (at p 50, appeal record, Vol 2):

> Q: Saya cadangkan kepada kamu semasa serbuan dilakukan kamu berada di tempat kejadian berseorangan, setuju atau tidak?
>
> A: Ya, setuju.
>
> Q: Dan ketika serbuan dilakukan saya cadangkan juga kepada kamu, kamu berada di atas motorsikal bernombor pendaftaran BMF 5327?
>
> A: Tidak.
>
> Q: Saya cadangkan kepada kamu, kamu kenal pemilik kenderaan tersebut Encik Kalairasan a/l Munusamy?
>
> A: Tidak.
>
> Q: Saya cadangkan kepada kamu, kamu biasa meminjam motorsikal daripada Encik Kalai?

A: Tidak.

[18] The effect of the failure by the prosecution to produce witnesses offered to the defence came up for consideration in *Public Prosecutor v Asnawi bin Yusuf* [2011] 4 MLJ 16 where in a similar case, this court observed (at p 24):

> Learned defence counsel gave ample warning to alert the court and especially to the learned deputy public prosecutor that it was his intention to call those witnesses including but not limited to M Dahlan, Edy Shahputra and Abdul Rahman.
>
> Now, perhaps curiously, when learned defence counsel wanted the above named three witnesses to testify, the public prosecutor said that all of them were not available. The reason proffered was that they cannot be traced as they are Indonesians! Such reason is simply untenable and indefensible particularly in a case involving the liberty of an individual. We have provisions in our laws to ensure that this would not have happened. It is clear law that when witnesses are offered by the prosecution to the defence at the end of the case for the prosecution, it is the bounden duty of the prosecution to avail these witnesses for the defence. If in the exercise of this duty, the prosecution fails to fulfill this obligation, the accused must be acquitted.

[19] If as the prosecution had told the trial judge that this witness cannot now be located, the prosecution could have at least provided the s 112 of the CPC statement to the defence so that they could then have some opportunity to deal with it or even introduce it into evidence if the law permitted it. In this context, this court in *Kobra Taba Seidali v Public Prosecutor* [2014] 2 MLJ 554; [2014] 2 CLJ 12 had occasion to hold that failure of the prosecution to produce the witness or hand over a copy of the witness statement to the defence to be used by the defence at the defence stage was fatal on the factual matrix of that case.

[20] Reverting to the instant appeal, there is some serious doubt as to the narrative introduced by the prosecution with regard to motorcycle BMF 5327. Apart from the court testimony of the police witnesses, the only reference to the said motorcycle was in the first information report by SP5 (exh P9) and the *borang serah menyerah* between police officers (exh P10). However, in the *senarai bongkar* (exh P16), which should contain items seized from the appellant, and which contains the signature of the appellant, there is tellingly no mention of the said motorcycle. When confronted with this discrepancy, SP5 claimed that he had overlooked mentioning the said motorcycle in P16.

[21] Curiously, apart from the fact that the said motorcycle was not produced, and did not appear in the *senarai bongkar* (exh P16), there is no record of the motorcycle being released to the owner on a bond as permitted by s 413 of the CPC. Quite remarkably as well, there is not a single photograph of this motorcycle adduced at the trial. There is also no Road Transport

Department search to at least show the particulars of this motorcycle and especially as to its existence and ownership.

[22] In the circumstances, there is merit in the appellant's argument that there was indeed no such motorcycle on the day of the appellant's arrest or at least, that the appellant had nothing to do with the motorcycle in question as he was, as he said, merely waiting at the bus stop for his girlfriend. The sum effect of these circumstances leads to a serious doubt as to the version introduced by the prosecution as to how the appellant came to be in possession of the illicit drugs. Indeed, it lends credence to the defence version that the appellant was merely waiting at the bus stop when he was arrested by the police and he had nothing to do with the drugs which formed the subject matter of the charge.

[23] In our assessment, as the defence was both reasonable and probable in view of the matters aforesaid, it must follow that there had been a sufficient rebuttal of the presumptions which applied against the appellant. The net effect is that a serious doubt had arisen as to the guilt of the appellant on the charges he faced such that the prosecution could not by any stretch be said to have proven the charge against the appellant beyond reasonable doubt.

CONCLUSION

[24] In the circumstances, and for the reasons we have given, we were of the view that there were merits in the appeal and that appellate intervention was warranted. Having scrutinised the whole of the evidence, and having regard to our reservations as expressed aforesaid, we found the conviction of the appellant to be wholly unsafe. The prosecution had left many material questions unanswered and the learned judge had failed to adequately address material aspect of the defence case which, in our view, amounted to a serious misdirection by way of non-direction. In short, the prosecution had failed to prove the charge against the appellant beyond reasonable doubt.

[25] Accordingly, we unanimously allowed the appeal and set aside the conviction and sentence passed by the High Court. The appellant was acquitted and discharged.

Appellant's appeal allowed; conviction set aside; appellant acquitted and discharged.

Reported by Afiq Mohamad Noor